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# From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court

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# From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court

## **Cover Page Footnote**

International Law; Commercial Law; Law

# From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court

*Michele Caianiello\* & Giulio Illuminati\*\**

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## I. Preamble

The establishment of an international criminal justice system represents an interesting subject for European scholars. There is an ever-increasing awareness that the European unification process cannot be considered complete until the European Union gives birth to a common justice system, especially in the field of criminal law. Common action is necessary to adequately respond to criminal activity that is becoming both more organized and more transnational. In addition to these considerations, European scholars have recognized the benefits of an effective international criminal justice system as a fundamental means of promoting and maintaining peace. In addition, European countries have joined the majority of the international community in seeking strategies to prevent the commission of international crimes and to punish persons responsible for committing them.

History shows that the road to establishing an International Criminal Tribunal is full of obstacles. Quantitatively, failures in this field are more numerous than successes. Nevertheless, in the last ten years the tide has shifted and new systems have been created at both international and European levels.<sup>1</sup> First, the United Nations Security Council established two ad hoc international tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Additionally, on July 17, 1998, the Plenipotentiaries Conference held in Rome approved the Statute of the International Criminal Court (Rome Statute), an agreement that may be considered the most important result obtained by the international community in the field of international criminal

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<sup>1</sup> In Europe, the most important step is the proposal currently being considered by the European Parliament for a European Prosecution Office for the defense of the European Union's financial interests. *See generally* JUSTICE AND HOME AFFAIRS IN THE EUROPEAN UNION—THE DEVELOPMENT OF THE THIRD PILLAR (J. Monar & J. Morgan eds., 1995); THE THIRD PILLAR OF THE EUROPEAN UNION—COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS (J. Monar & J. Morgan eds., 1994); POSSIBILITÀ E LIMITI DI UN DIRITTO PENALE COMMUNITARIO (L. Picotti ed., 1998); PROSPETTIVE DI UN DIRITTO PENALE EUROPEO (G. Grasso ed., 1998).

justice.<sup>2</sup>

From a European perspective, the most interesting international criminal justice system is the ICTY. The ICTY is not, however, a European criminal justice institution. The United Nations created the ICTY in 1993 as a subsidiary instrument for achieving and maintaining peace in the Balkans Region.<sup>3</sup> The decision to establish this ICTY was not made by European states alone, but instead was supported by the international community and by the United States.<sup>4</sup>

The ICTY is significant to Europeans for two reasons. First, it is located in Western Europe, at the Hague in the Netherlands.<sup>5</sup> Its roots and its very existence are strictly related to the civil war in the former Yugoslavia, a European tragedy whose causes are interlaced with the history of many European countries.<sup>6</sup>

To a criminal procedure student, international criminal justice presents two interesting aspects. On the one hand, international tribunals can be considered a laboratory where different cultures and procedural methods are merged. Many unique facets of international tribunals stem from attempts to blend the two predominant western juridical traditions, civil law and common law. These international experiments may serve as models for European countries attempting to reform their domestic criminal justice systems. For example, in 1989, a new Italian Code of

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<sup>2</sup> See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/Conf. 183/9 (1998), 37 I.L.M. 999 [hereinafter ROME STATUTE]. The Rome Statute, however, is not yet in force. Article 126 of the Statute states that it will become effective after the deposit of the sixtieth instrument of ratification. *Id.* art. 126, 37 I.L.M. at 1068. By December 2000, only twenty-one countries had ratified the Statute.

<sup>3</sup> M. CHERIF BASSIOUNI & P. MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 202 (1996).

<sup>4</sup> MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 51-73 (1997). For the historical and political circumstances that provided general international consent for the establishment of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, see M. Cherif Bassiouni, *Historical Survey*, in *A.I.D.P., ICC Ratification and National Implementation Legislation*, 13-14 (1999).

<sup>5</sup> BASSIOUNI & MANIKAS, *supra* note 3, at 209.

<sup>6</sup> 1 VIRGINIA MORRIS & MICHAEL SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 18-22 (1995).

Criminal Procedure entered into force, attempting to graft adversarial characteristics onto the inquisitorial Italian criminal process. Before the reform, the Italian Code had been based exclusively on the continental European civil law systems, historically influenced by the French *Code Napoléon*. The reform represented a significant break with Italian tradition. It did not succeed completely because Italian courts have been reluctant to accept and to conform to the new adversarial model. For this reason, the study of the new international criminal tribunals is an exciting prospect for Italian scholars. Many of the procedural problems handled by these tribunals are similar to those examined by the Italian courts, especially with regard to the law of evidence.<sup>7</sup>

The second aspect of interest in the international criminal justice system is the new shape of the legality principle emerging from the practice of the international tribunals. For a civil law jurist, it is unusual to have many different sources of criminal law. Sources of criminal law for the international tribunals include statutory law, international treaties, customary law, and case law.<sup>8</sup> In some ways, international criminal law appears to be a complex patchwork composed of different pieces. This conception of the legality principle is a new one for many European jurists and therefore is the object of much study.

Developments in the field of international criminal justice will have far-reaching impacts on the international community as a whole and for individual states within that community. This work chronicles many of those developments and forecasts the impact they are likely to have. The second part of this paper is a concise historical perspective on attempts to establish international tribunals.<sup>9</sup> The third and fourth parts focus on the ICTY<sup>10</sup> and on

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<sup>7</sup> See *infra* notes 169-287 and accompanying text.

<sup>8</sup> Case law includes decisions by the Nuremberg and the ad hoc International Tribunals, as well as those of national courts called to judge international criminal cases. Example of the latter types of cases are: the *Eichman* case decided by an Israeli court, the *Papon* case decided by a French court and the *Priebke* case decided by an Italian Court. See M. Cherif Bassiouni, *Historical Survey in ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION* (1999).

<sup>9</sup> See *infra* notes 9-90 and accompanying text.

<sup>10</sup> See *infra* notes 91-170 and accompanying text.

the Rome Statute.<sup>11</sup> As regards the latter, this article gives a general overview of the criminal procedure established therein.

## II. Major Developments in the History of International Criminal Jurisdiction

### A. Historical Antecedents

Five centuries ago, the first international criminal court brought to justice a party responsible for what today would be characterized as international crime (in this case, as a crime against humanity).<sup>12</sup> In 1474, an ad hoc international criminal tribunal composed of twenty-eight judges from Alsace, Germany and Switzerland, with a presiding judge from Austria, tried and convicted Peter von Hagenbach, the Burgundian Governor of Breisach.<sup>13</sup> Hagenbach was accused of many crimes, including murder, rape, perjury and other crimes in violation of “the laws of God and man,” during his occupation of the town of Breisach.<sup>14</sup> Hagenbach had acted on behalf of Charles, the Duke of Burgundy, at a time when there were no hostilities.<sup>15</sup> At the end of the trial, von Hagenbach was sentenced to death.<sup>16</sup>

Gustav Moynier of Switzerland made the first proposal for a permanent international criminal tribunal in modern history more than a century ago.<sup>17</sup> Horrified by the atrocities committed by both sides in the Franco-Prussian War of 1870, he proposed the establishment of an international criminal court in January 1872.<sup>18</sup> The purpose of the court was to deter violations of the Geneva Convention of 1864 and to bring to justice anyone responsible for

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<sup>11</sup> See *infra* notes 171-297.

<sup>12</sup> See GEORG SCHWARZENBERGER, *INTERNATIONAL LAWS AS APPLIED BY COURTS AND TRIBUNALS* 462-66 (1968).

<sup>13</sup> *Id.* at 463.

<sup>14</sup> *Id.* at 465.

<sup>15</sup> *Id.* at 462-63.

<sup>16</sup> *Id.* at 466.

<sup>17</sup> Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS JUST. 207, 208 (1999); Gustave Moynier, *Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève*, BULL. INT'L, No. 11, 122 (1872).

<sup>18</sup> Arbour, *supra* note 17, at 208-09.

such violations.<sup>19</sup>

Immediately after the end of the first World War, on January 25, 1919, the Paris Peace Conference appointed the Commission on the Responsibility of the Authors of the War and of the Enforcement of Penalties for Violations of the Laws and Customs of War (1919 Peace Conference Commission).<sup>20</sup> The 1919 Peace Conference Commission proposed that an ad hoc tribunal be established to try persons responsible for violations of the laws of war and the laws of humanity.<sup>21</sup> The commission documented many categories of offenses against the laws and customs of war, including the deliberate bombardment of undefended places, and attacks against hospital ships by the Germans.<sup>22</sup> This proposal, however, was rejected in favor of adding provisions in the Versailles Treaty for an ad hoc international tribunal to try Kaiser Wilhelm II for "a supreme offence [sic] against international morality and the sanctity of treaties."<sup>23</sup> Additionally, the Treaty of Sèvres provided for the prosecution of Turkish war criminals as a result of the massacre of over a million Armenians by Turkish authorities.<sup>24</sup> However, no international tribunal was ever established for this purpose. Instead, Kaiser Wilhelm was given sanctuary in the Netherlands and the allies consented to the trial of the Germans accused before the German Supreme Court sitting in Leipzig.<sup>25</sup> Out of the 896 Germans accused of war crimes by the Allies, only twelve were tried; and of the twelve, only six were convicted.<sup>26</sup> The Turks received amnesty for their crimes by the Treaty of Lausanne, which replaced the Treaty of Sevres.<sup>27</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 14 (1997).

<sup>21</sup> D. Matas, *Prosecuting Crimes against Humanity: The Lessons of World War I*, 13 FORDHAM INT'L L.J. 86, 87 (1989).

<sup>22</sup> *Id.*

<sup>23</sup> Bassiouni, *supra* note 20, at 12.

<sup>24</sup> V. N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 281 (1989).

<sup>25</sup> *Id.* at 316.

<sup>26</sup> *Id.* at 317.

<sup>27</sup> *Id.* at 314-15.



### *B. The Nuremberg Precedent*

The creation of the first effective international criminal tribunal of the twentieth century dates back to the conclusion of World War II. In 1941, the Allies decided to prosecute and punish those persons responsible for serious violations of humanitarian law.<sup>28</sup> In October 1943, the Allies set up the United Nations Commission for the Investigation of War Crimes, which issued the Moscow Declaration. The Moscow Declaration stated that after the war, German and Japanese political and military leaders responsible for war crimes, crimes against humanity, and conducting aggressive war would be brought to trial for these offenses.<sup>29</sup> In August 1945, France, the United Kingdom, the United States, and the Soviet Union met in London and established an agreement providing for the establishment of the International Military Tribunal at Nuremberg.<sup>30</sup> The Nuremberg Tribunal was created to try the highest ranking German officials accused of crimes against peace, war crimes, and crimes against humanity.<sup>31</sup>

According to the Nuremberg Charter, each of the four victorious allied powers appointed one of the judges and one of the four chief prosecutors.<sup>32</sup> The chief prosecutors had the duty of preparing the indictments and drafting the rules of procedure for the Nuremberg Tribunal so that they could be approved by its members.<sup>33</sup> It is interesting to note that this provision does not appear in either the Statute creating the ICTY or the Statute

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<sup>28</sup> G. Vassalli, *Il Tribunale internazionale per i crimini commessi nei territori della ex-Jugoslavia*, LEG. PEN. 335 (1994).

<sup>29</sup> See ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); ROBERT E. CONOT, *JUSTICE AT NUREMBERG* (1983); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1983); A. Wievorka, *Le procès de Nuremberg et d'Eichmann en perspective*, in JUSTICE INTERNATIONALE DE NUREMBERG A LA HAYE ET ARUSHA 23-27 (A. Destexhe & M. Foret eds., 1997); Otto Kranzbühler, *Nuremberg 18 Years Afterwards*, 14 DEPAUL L. REV. 333 (1965); C. Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237 (1994).

<sup>30</sup> TUSA & TUSA, *supra* note 29, at 84-85.

<sup>31</sup> *Id.* at 33-48.

<sup>32</sup> SCHARF, *supra* note 4, at 10.

<sup>33</sup> *Id.* at 7.

creating the International Criminal Court, both of which mandate that the Rules of Procedure and Evidence be drafted by Tribunal judges and not by the Office of the Prosecutor.

The Nuremberg Tribunal was not bound by technical rules of evidence and could admit any evidence that it deemed to have probative value. This evidentiary provision does appear in the rules for the present International Criminal Tribunal for the Former Yugoslavia<sup>34</sup> and in the drafting of the statute establishing an International Criminal Court.<sup>35</sup> Moreover, the Nuremberg judges had the power to require the presence and the testimony of witnesses, to interrogate defendants, and to compel the production of documents and other evidence.<sup>36</sup> In other words, the Nuremberg judges could provide for the admission and the gathering of evidence *ex officio*, as is done in the inquisitorial system.<sup>37</sup>

The Nuremberg Charter and Rules of Procedure tried to blend and balance elements of the Continental European system, which is primarily inquisitorial, and the Anglo-American adversarial system.<sup>38</sup> Generally, under the European inquisitorial system, most of the documentary and testimonial evidence is presented to an examining magistrate who assembles it in a dossier.<sup>39</sup> Copies of the magistrate's dossier are provided to the defendant and to the court prior to trial.<sup>40</sup> The court, either on its own motion or at the request of one of the parties, can question witnesses directly; furthermore, cross-examination by opposing counsel is rare.<sup>41</sup> In the Anglo-

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<sup>34</sup> JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 417 (2000). This provision is incorporated into Rule 90. *Id.*

<sup>35</sup> ROME STATUTE, *supra* note 2, art. 69, 37 I.L.M. at 1041-42.

<sup>36</sup> SCHARF, *supra* note 4, at 6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; See generally M.R. DAMASKA, *EVIDENCE LAW ADRIFT* (1995); M.R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986). In Italy there is a vast field of literature on the differences between the accusatorial and inquisitorial system. See F. CORDERO, *IDEOLOGIE DEL PROCESSO PENALE* 167 (1966); L. FERRAJOLI, *DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE* 572-87 (1989); P. FERRUA, *STUDI SUL PROCESSO PENALE*, II (1992); P. FERRUA, *STUDI SUL PROCESSO PENALE*, I (1990); G. Illuminati, *Accusatorio E Inquisitorio (Sistema)*, in *ENC. GIUR. TRECCANI* I (1988).

<sup>39</sup> SCHARF, *supra* note 4, at 6.

<sup>40</sup> *Id.* at 6-7.

<sup>41</sup> *Id.*

American system, by contrast, the indictment contains only a summary of the facts alleged and the evidence is presented in court by lawyers who examine and cross-examine the witnesses.<sup>42</sup>

Mixing elements from both systems, the Nuremberg Charter required, for instance, that the defendants testify as witnesses on their own behalf, contrary to Continental practice.<sup>43</sup> Contrary to Anglo-American practice, defendants could also make an unsworn statement at the end of the trial.<sup>44</sup> Moreover, the Nuremberg Charter required, contrary to the Anglo-American practice, that the indictment detail the specific charges against the defendants and include any supporting documents.<sup>45</sup> Upon conviction of a defendant, the Nuremberg Tribunal was authorized to impose any punishment it considered to be just, including the death penalty, and its judgments were not subject to any review.<sup>46</sup>

Nevertheless, the Nuremberg Charter, in order to ensure a fair trial, guaranteed certain minimum rights to the person accused. Those rights included: the right to be informed of the indictment at a reasonable time before trial, the right to give any relevant explanation to the charges, the right to translation of proceedings, the right to assistance of counsel, and the right to present evidence and to cross-examine any witness called by the prosecution.<sup>47</sup> At the same time, the Nuremberg Charter limited the rights of the accused by providing for trials *in absentia*, and precluding any challenges relating to the Nuremberg Tribunal or its judges.<sup>48</sup> Of the twenty-two German officials who were tried at Nuremberg, nineteen were found guilty and twelve were sentenced to death.<sup>49</sup>

The jurisprudence of the Nuremberg Tribunal has constituted the main legal basis for over a thousand subsequent war crimes trials conducted by military tribunals in occupied zones in

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<sup>42</sup> *Id.* at 6-7.

<sup>43</sup> *Id.* at 7.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 10.

<sup>47</sup> VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 6 (1995).

<sup>48</sup> *Id.*

<sup>49</sup> SCHARF, *supra* note 4, at 10.

Germany and in the liberated or allied nations.<sup>50</sup> Japanese war criminals accused of crimes after World War II were tried before the International Military Tribunal for the Far East (Tokyo Tribunal), whose Charter was based largely on the Charter of the Nuremberg Tribunal.<sup>51</sup>

The Nuremberg Charter and Judgment are among the most significant developments in international law in this century. Today, the Nuremberg precedent continues to stand for the principle of individual accountability for the commission of war crimes and crimes against humanity.<sup>52</sup> However, the trial before the Nuremberg Tribunal was not free from criticism. It was a victor's tribunal before which only the defeated were called to account for violations of international humanitarian law.<sup>53</sup> The defendants were prosecuted and punished for crimes expressly defined in an instrument adopted by the victors at the conclusion of the war, thus after the commission of the alleged criminal act, in violation of the established legal principle *nullum crimen, nulla poena sine praevia lege*. From this perspective, the Nuremberg and Tokyo trials were technically a sophisticated method of exercising vengeance against the enemy. Perhaps this system was not unrelated to the ancient Roman practice of spreading salt over the ruins of the villages defeated by Roman armies. Moreover, in the absence of a clearly articulated international standard, the Nuremberg Tribunal relied on limited procedural rules drawn from general principles recognized by different legal systems.<sup>54</sup>

Notwithstanding the aforementioned criticisms, it would be unfair to judge this precedent too rigorously. In fact, the Nuremberg Tribunal led to other significant developments in international criminal law in the years following World War II. The principles recognized in the Nuremberg Charter and Judgment were unanimously affirmed by the United Nations General Assembly in 1946.<sup>55</sup> The Nuremberg Charter's definition of persecution as a crime against humanity led to the adoption of the

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<sup>50</sup> *Id.*

<sup>51</sup> R.H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 20-21 (1971).

<sup>52</sup> SCHARF, *supra* note 4, at 11.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 11.

<sup>55</sup> *Id.* at 13-14.

Convention on the Prevention and Punishment of the Crime of Genocide in 1948, a convention that recognizes the possibility of the trial of alleged perpetrators before an international tribunal.<sup>56</sup> Moreover, the definition of war crimes contained in the Nuremberg Charter was codified and further developed in the four Geneva Conventions for the protection of war victims adopted in 1949.<sup>57</sup> The Geneva Conventions require State-parties to bring persons alleged to have committed or ordered “grave breaches” of humanitarian law, regardless of their nationality, to trial before a national court or, if possible, before an international tribunal.<sup>58</sup>

*C. The Legal and Factual Circumstances That Led to the Establishment of the International Tribunal for the Former Yugoslavia*

Two converging factors compelled the international community, and particularly the Security Council, to draft the ICTY Statute.<sup>59</sup> First, widespread media coverage focused attention not only on the atrocities committed in the former Yugoslavia, but also on the repeated failure of the international community to induce a negotiated peace between the warring parties.<sup>60</sup> Second, the major world powers recognized a common interest in punishing the individuals who committed such atrocities.<sup>61</sup> The decision to establish the tribunal was the result of a series of steps taken by the Security Council beginning in the summer of 1992.<sup>62</sup>

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<sup>56</sup> See generally W. Shabas, *Article 6 Genocide*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ARTICLE BY ARTICLE 27 (O. Triffterer ed. 1999) [hereinafter COMMENTARY ON THE ROME STATUTE]; Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT'L L. 145 (1947).

<sup>57</sup> SCHARF, *supra* note 4, at 14.

<sup>58</sup> 1 MORRIS & SCHARF, *supra* note 6, at 64-69.

<sup>59</sup> *Id.* at 17. For a history of the establishment of the International Criminal Court, see M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49 (1995) and M. Cherif Bassiouni & Christopher Blakesley, *The Need for an International Criminal Court in the New World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992).

<sup>60</sup> 1 MORRIS & SCHARF, *supra* note 6, at 17.

<sup>61</sup> M. CHERIF BASSIOUNI, THE COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780: INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA 2 (1996).

<sup>62</sup> 1 MORRIS & SCHARF, *supra* note 6, at 17.

In 1991, Croatia and Slovenia declared their independence from Yugoslavia without assuring the security of the 500,000 Serbs living within their borders.<sup>63</sup> It was feared that Serbs living in an independent Croatia and Slovenia might fall victim to atrocities similar to those committed during World War II when Ustashi, a genocidal Croat organization, exterminated nearly one million Serbs in Croatia.<sup>64</sup> These concerns were sufficiently grave to rally support for an aggressive response. Slobidan Milosevic, at that time not yet President of Yugoslavia, began by sending the Serb-dominated Yugoslav National Army into Slovenia.<sup>65</sup> That was the beginning of the most recent Yugoslav tragedy. One year later, in 1992, the war was extended to Bosnia.<sup>66</sup>

In 1992, international organizations began observing numerous gross violations of international humanitarian law occurring in Bosnia.<sup>67</sup> In just 18 months, approximately 150,000 murders were perpetrated, particularly in Sarajevo where more than 10,000 persons died in two years, 2,500 of whom were children.<sup>68</sup> The Secretary-General of the United Nations reported to the Security Council that the Serbs of Bosnia-Herzegovina, with support from the Yugoslav Army, were "making a concerted effort . . . to create ethnically pure regions" in the republic, and that the "techniques used are the seizure of territory by military force and intimidation of the non-Serb population."<sup>69</sup> Many people were tortured and killed in a manner reminiscent of the Nazi concentration camps of World War II. Although Serb forces committed most of these atrocities, the reports indicate that all ethnic groups engaged in the conflict committed abuses.<sup>70</sup>

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<sup>63</sup> *Id.* at 19.

<sup>64</sup> *Id.* at 18-19.

<sup>65</sup> *Id.* at 19.

<sup>66</sup> *Id.* at 19-20.

<sup>67</sup> *Id.*

<sup>68</sup> Vassalli, *supra* note 28, at 341.

<sup>69</sup> 1 MORRIS & SCHARF, *supra* note 6, at 22 (quoting *Further Report of the Secretary-General Pursuant to Security Council Resolution 749*, ¶ 5, U.N. Doc. S/23900 (1992)).

<sup>70</sup> *Id.* at 22.

*D. The Response of the Security Council*

By means of Resolution 780, the Security Council requested that the Secretary-General establish a Commission of Experts to provide him its conclusions on the evidence of “grave breaches of the Geneva Conventions and other violations of the international humanitarian law” committed in the territory of the former Yugoslavia.<sup>71</sup> In the aforementioned Resolution, the Security Council expressed alarm at the continuing reports of mass killings and the inhumane practice of ethnic cleansing in the territory of the former Yugoslavia.<sup>72</sup>

Within a few months, the Commission of Experts nominated by the Secretary-General presented a report in which it concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia.<sup>73</sup> The Commission defined the relatively new term of “ethnic cleansing,” in the context of the Yugoslav conflict, as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”<sup>74</sup> It concluded that ethnic cleansing had been performed “by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians.”<sup>75</sup> The Commission further concluded that this practice of ethnic cleansing constituted a crime against humanity as well as the crime of genocide as defined in the Genocide Convention.<sup>76</sup> It also determined that ethnic cleansing could be identified with specific war crimes.<sup>77</sup>

The Commission of Experts discussed the establishment of an *ad hoc* international criminal tribunal to deal with the violations in

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<sup>71</sup> *Id.* at 24-25 (quoting S.C. Res. 780, U.N. SCOR, 47<sup>th</sup> Sess., ¶ 2, U.N. Doc. S/RES/780 (1992)).

<sup>72</sup> *Id.* at 22.

<sup>73</sup> *Id.* at 28.

<sup>74</sup> *Id.* (referring to U.N. Doc. S/25274, ¶ 55).

<sup>75</sup> *Id.* at 28-29 (referring to U.N. Doc. S25274, ¶ 56).

<sup>76</sup> *Id.* at 29.

<sup>77</sup> *Id.*

the Former Yugoslavia.<sup>78</sup> While expressing the opinion that "it would be for the Security Council or another competent organ of the United Nations to establish such a tribunal," the Commission "observe[d] that such a decision would be consistent with the direction of its work."<sup>79</sup> Considering the fact that the Commission was presided over by Professor M. Cherif Bassiouni, the preeminent scholar of the international criminal justice system, such a suggestion appeared to be an inevitable conclusion.

In February 1993, the Security Council adopted Resolution 808 in which it established an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991."<sup>80</sup> On May 25, 1993, the Security Council, acting under Chapter VII of the United Nations Charter, unanimously adopted the Statute of the International Tribunal,<sup>81</sup> as proposed by the Secretary-General in Resolution 827.<sup>82</sup>

The Security Council excluded the treaty approach to addressing the situation because it presented too many difficulties in terms of the time required to negotiate and conclude the treaty.<sup>83</sup> Thus, the Security Council relied instead on Chapter VII of the United Nations Charter. Article 41 of that chapter of the Charter provides that "[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions."<sup>84</sup> Although the Security Council is not expressly authorized to establish a war crimes tribunal, the Charter is interpreted as giving the Security Council the powers necessary

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (referring to U.N. Doc. S25274, ¶ 74).

<sup>80</sup> *Id.* at 31 (quoting S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993)).

<sup>81</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), art. 27, U.N. Doc.S/25704/Annexes (1993) [hereinafter ICTY Statute].

<sup>82</sup> *Id.* at 33 (quoting S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993)).

<sup>83</sup> *Id.* at 40.

<sup>84</sup> U.N. CHARTER art. 41.



to maintain international peace and security.<sup>85</sup>

Recently, one scholar advanced the opinion that the legal basis for the establishment of the ICTY is found in the common tacit consent expressed by the international community.<sup>86</sup> According to this theory, Chapter VII is not considered a sufficient element for ensuring the legality of such a Tribunal, because Article 41 of the United Nations Charter does not mention the power to create a jurisdictional organ as a subsidiary of the Security Council. However, it must be noted that in the ICTY's first decision, the Chamber declared that the legal basis of the Tribunal existence was founded in Article 41 of the U.N. Charter.<sup>87</sup>

The establishment of an international tribunal was thus considered consistent with the purpose of maintaining international peace and security.<sup>88</sup> Particularly, the Security Council decided that a neutral tribunal capable of prosecuting and punishing individuals would provide an effective deterrence to further atrocities.<sup>89</sup>

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<sup>85</sup> 1 MORRIS & SCHARF, *supra* note 6, at 42.

<sup>86</sup> M. VITUCCI, *IL TRIBUNALE AD HOC PER LA EX JUGOSLAVIA E IL CONSENSO DEGLI STATI* (1998).

<sup>87</sup> Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction, IT-94-1, ¶¶ 2, 7, 19, & 35 (ICTY Aug. 10, 1995) available at <http://www.un.org/icty>. See also G. Arangio-Ruiz, *The Establishment of the International Criminal Tribunal for the Former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations*, in *DAI TRIBUNALI PENALI INTERNAZIONALI AD HOC A UNA CORTE PERMANENTE* 31 (F. Lattanzi & E. Sciso eds., 1996); M. Balboni, *Da Norimberga alla Corte penale internazionale*, in *CRIMINI INTERNAZIONALI TRA DIRITTO E GIUSTIZIA. DAI TRIBUNALI INTERNAZIONALI ALLE COMMISSIONI VERITA E RICONCILIAZIONE* 15-18 (G. Illuminati, L. Stortoni & M. Virgilio eds., 2000) [hereinafter *CRIMINI INTERNAZIONALI TRA DIRITTO E GIUSTIZIA*]; R. Charvin, *Premières observations sur la création du Tribunal Permanent international de la résolution du Conseil de Sécurité des Nations Unies*, in *I DIRITTI DELL'UOMO. CRONACHE E BATTAGLIE* 382 (1993); T. Meron, *The Case for War Crimes Trials in Yugoslavia*, in *FOREIGN AFFAIRS* 122 (1993); A. Péllet, *Le tribunal criminel international pour l'ex Yougoslavie. Poudre aux yeux ou avancée décisive?*, in *REVUE DE DROIT INTERNATIONAL PUBLIC* 7 (1994); P. Picone, *Sul fondamento giuridico del Tribunale penale internazionale per la ex Jugoslavia*, in *LA COMUNITA' INTERNAZIONALE* 3 (1996); G. Vassalli, *supra* note 25, at 335.

<sup>88</sup> 1 MORRIS & SCHARF, *supra* note 6, at 43-44.

<sup>89</sup> *Id.* at 44.

*E. The Establishment of the International Criminal Tribunal for Rwanda and the Approval of the International Criminal Court Statute*

In 1994, one year after the establishment of the ICTY, the Security Council passed Resolution 955, creating the ICTR. It has jurisdiction over international crimes committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. The Rwanda Tribunal is a sort of "Siamese twin" to the ICTY, because the bodies share both an Office of the Prosecutor and an Appeal Chamber.<sup>90</sup>

The ICTY became effective in 1994, just after the Security Council appointed Mr. Richard Goldstone to be the Tribunal's first Prosecutor.<sup>91</sup> The judges were elected by the General Assembly of the United Nations.<sup>92</sup> Approximately six years have passed since the Tribunal became effective. The Prosecutor has opened thirty-two cases and indicted more than fifty suspects. The Chambers have pronounced sixteen judgments, four of which have been already decided by the appeal Chamber and are therefore definitive. So far, these results cannot be criticized in terms of either efficiency or fairness.

The establishment of the ICTY, along with the creation of the ICTR, served as a fundamental step toward the establishment of an international criminal court. The experiences of these ad hoc tribunals have demonstrated both the need for and the feasibility of establishing a permanent international criminal court. As Mr. Graham T. Blewitt, Deputy Prosecutor to the ICTY, said:

The Tribunals have achieved remarkable results,

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<sup>90</sup> See MORRIS & SCHARF, *supra* note 47. There are many interesting questions addressed in the judgments of the Rwanda Tribunal. For example, the *Akayesu* Judgement establishes the relationship between sexual violence and genocide. Prosecutor v. Akayesu, 96-4-T, paras. 507-08 (ICTR Sept. 2, 1998) available at <http://www.ictor.org>. The *Kambanda* case chronicles the use of the guilty plea before an international tribunal. Prosecutor v. Kambanda, 97-23-S, § B (ICTR Sept. 4, 1998) available at <http://www.ictor.org>.

<sup>91</sup> KARINE LESCURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 15 (1996).

<sup>92</sup> *Id.*

although they are far from perfect. They took some time to get started and they have been starved, even today, of adequate and necessary resources. Yet, despite their imperfections and at times insurmountable difficulties, they have demonstrated that it is possible to create, at the international level, a fully-functioning criminal justice system, and they have confirmed it, effecting arrests of indicted accused, holding fair trials, and dispensing a satisfactory standard of justice which is open to public scrutiny.<sup>93</sup>

Lessons learned from the success of the ad hoc war crimes tribunals for the Former Yugoslavia and Rwanda fueled the drive for a permanent international criminal court. With the media coverage they received, the tribunals focused public attention on bringing war criminals to justice and taught the international community what it takes to create an international criminal court.

In 1994, in the same period during which the ad hoc tribunals were being created, the Security Council charged the International Law Commission to propose and elaborate the first draft statute for the establishment of an international criminal court. In 1995, the United Nations General Assembly established an ad hoc committee to work on the draft proposed by the International Law Commission. In 1996, the United Nations charged a Preparatory Committee (PrepCom) with preparing a new draft statute for an international criminal court. In 1997, the PrepCom called for a diplomatic conference to be held in Rome to adopt a convention establishing an international criminal court. Finally, on July 17, 1998, the Rome Statute, subscribed by 120 States, was approved.

### **III. A Legal Analysis of the International Criminal Tribunal for the Former Yugoslavia**

#### *A. The Crimes Defined by the Statute*

The ICTY Statute, adopted by Security Council Resolution 827, lists the crimes over which the ICTY has jurisdiction. The

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<sup>93</sup> Graham T. Blewitt, *International and National Prosecutions in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE, 17-21 SEPTEMBER 1998* 155, 155 (1998).

ICTY Statute also provides general principles of substantive criminal law and procedure and establishes the general structure of the ICTY.<sup>94</sup> The Statute does not dictate the details of the functioning of the ICTY, but rather authorizes the judges to undertake this task by adopting Rules of Procedure and Evidence.<sup>95</sup> The ICTY Statute specifically establishes the jurisdiction of the Tribunal with respect to grave breaches of the 1949 Geneva Conventions, war crimes including violations of the laws or customs of war, genocide, and crimes against humanity.<sup>96</sup>

Article 2 of the ICTY Statute defines crimes related to grave breaches of the Geneva Conventions. The list includes willful killing, torture or inhuman treatment, extensive destruction and appropriation of property not justified by military necessity, and taking civilians as hostages.<sup>97</sup> One problem raised by this provision is the exact meaning of "inhuman treatment." In the *Aleksovski* Judgment,<sup>98</sup> the ICTY, referring to inhuman treatment, stated that "it is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual."<sup>99</sup>

Article 3 of the ICTY Statute is related to war crimes.<sup>100</sup> The text is based primarily on the Nuremberg Charter, as applied by the Nuremberg Tribunal.<sup>101</sup> The Nuremberg Tribunal recognized the Nuremberg Charter's definition of war crimes as "declaratory of the laws and customs of war."<sup>102</sup> Violations include, but are not

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<sup>94</sup> ICTY Statute, *supra* note 81.

<sup>95</sup> *Id.* art. 15.

<sup>96</sup> *Id.* art. 1-10.

<sup>97</sup> *Id.* art. 2.

<sup>98</sup> Prosecutor v. Aleksovski, IT-95-14/1, para. 56 (ICTY June 25, 1999) available at <http://www.un.org/icty>.

<sup>99</sup> G. Irving & A. Dare Draper, *The Modern Pattern of War Criminality*, in WAR CRIMES IN INTERNATIONAL LAW 141 (Yoram Dinstein & Mala Tabory eds., 1996); GEORG SCHWARZENBERGER, *INTERNATIONAL LAW: THE LAW OF ARMED CONFLICT* ch. 39 (1968); M. Cherif Bassiouni, *Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 RUTGERS-CAM. L.J. 185 (1977).

<sup>100</sup> ICTY Statute, *supra* note 81, art. 3.

<sup>101</sup> 1 MORRIS & SCHARF, *supra* note 6, at 69.

<sup>102</sup> U.N., *THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS* 83 (1949).

limited to, employment of poisonous weapons or other weapons calculated to cause unnecessary suffering, attack or bombardment of undefended towns, and plunder of public or private property.<sup>103</sup>

The most significant crimes in the ICTY Statute are those defined by Articles 4 and 5, genocide and crimes against humanity respectively.<sup>104</sup> "Genocide means any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."<sup>105</sup> These acts may include killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.<sup>106</sup> The provisions of the Statute dealing with genocide are drawn word for word from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, signed in Paris on December 9, 1948.<sup>107</sup>

When the Security Council established the ICTY, it referred explicitly to the "practice of ethnic cleansing including for the acquisition and the holding of territory."<sup>108</sup> Judge Riad, as part of the *Srebrenica* indictment,<sup>109</sup> confirming the second indictment against Radovan Karadzic and Ratko Mladic, referred to "ethnic cleansing" as a form of genocide: "the policy of ethnic cleansing . . . presents in its ultimate manifestation, genocidal characteristics," as they may be inferred from the gravity of "the mass killings of Muslims which occurred after the fall of Srebrenica in July 1995, which were committed in circumstances manifesting an almost unparalleled cruelty."<sup>110</sup>

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<sup>103</sup> ICTY Statute, *supra* note 81, art. 3.

<sup>104</sup> *Id.* art. 4.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 1 MORRIS & SCHARF, *supra* note 6, at 86.

<sup>108</sup> S.C. Res. 827, U.N. SCOR 3217th mtg., U.N. Doc. S/RES/827 (1993).

<sup>109</sup> Prosecutor v. Radovan Karadzic and Ratko Mladic, IT-95-18-I, (ICTY Nov. 16, 1995) available at <http://www.un.org/icty>. The ICTY often refers to a case by the name of the prison camp involved, or, as in the present case, by the name of the town where the crimes were committed.

<sup>110</sup> *Id.*

Article 5 of the ICTY Statute concerns crimes against humanity, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhuman acts.<sup>111</sup> The Secretary-General noted in his report that "crimes against humanity were first recognized in the Charter and Judgment of the Nuremberg Tribunal . . . Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."<sup>112</sup> In the *Jelusic* Judgment,<sup>113</sup> the ICTY, referring to the sub-characterization of "other inhumane acts" contained in Article 5, stated that the notion carries a meaning equivalent to that of "inhuman treatment" as defined in relation to grave breaches of the Geneva Conventions in Article 2 of the Statute of the Geneva Conventions.<sup>114</sup>

*B. Structure of the Tribunal and Elements of Criminal Procedure*

The Rules of Procedure and Evidence, along with the ICTY Statute, provide for simple and expeditious, but fair trials. As the Nuremberg Charter did previously, they try to balance the rights of the accused with the interests of the international community. The Rules incorporate most of the applicable standards relating to criminal justice that the United Nations advocated, including the fair trial provisions of the International Covenant on Civil and Political Rights. The Tribunal's rules also ban the death penalty, in keeping with United Nations pronouncements on this matter.<sup>115</sup> Likewise, the rules declare inadmissible any evidence obtained as a result of torture, in conformity with the relevant United Nations

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<sup>111</sup> ICTY Statute, *supra* note 81, art. 5.

<sup>112</sup> Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993).

<sup>113</sup> *Prosecutor v. Jelusic*, IT-95-10, (ICTY Dec. 14, 1999) available at <http://www.un.org/icty>.

<sup>114</sup> *Id.* para. 52.

<sup>115</sup> RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, IT/32/Rev. 3, Rule 95 (Jan. 30, 1995), Rule 95 (stating that evidence may not be obtained by means contrary to internationally protected human rights).

convention.<sup>116</sup> The Tribunal also has adopted rules governing the detention of persons awaiting trial or appeal that conform to United Nations standards.<sup>117</sup>

Whereas the Nuremberg Tribunal was established for the purpose of trying only major war criminals, the jurisdiction of the ICTY is not so restricted. The ICTY has jurisdiction over all crimes constituting “serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>118</sup> Under the Statute, these violations are investigated and adjudicated by an international criminal justice system consisting of three principal organs: the Chambers (including three Trial Chambers and one Appeals Chamber), the Prosecutor, and the Registry.<sup>119</sup> The Chambers organ, which performs the adjudicatory function of the Tribunal, was designed to ensure full respect for the rights of the accused, the effective performance of judicial functions, preservation of the international character of the institution, and the efficient administration of justice.<sup>120</sup> The Chambers organ consists of eleven independent judges from different States who preside over the entire trial, from the pretrial phase to the appeal.<sup>121</sup> The Office of the Prosecutor performs the investigatory role of the Tribunal, investigating,

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<sup>116</sup> *Id.* at Rule 101 (stating that the highest penalty to be imposed is imprisonment for life).

<sup>117</sup> See JONES, *supra* note 34, at 100-01, 104-05, 217, 222-30. Some preliminary remarks are necessary to this analysis of the International Criminal Procedure for the Former Yugoslavia. Generally speaking, the literature related to this subject is not as developed as the work on substantive international criminal law. The commentaries of the RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL PROCEDURE FOR THE FORMER YUGOSLAVIA are not sufficient for a deep and complete analysis of this subject. To achieve a sufficient analysis, it is necessary to start with a solid understanding of the domestic criminal procedure system and then apply the basic principles of comparative criminal procedure. Thus, it is extremely important to focus on the main differences between the Anglo-American system and the continental system. See generally DAMASKA, *supra* note 38 (discussing comparative criminal procedure and evidence law).

<sup>118</sup> JONES, *supra* note 34, at 43.

<sup>119</sup> *Id.* at 154.

<sup>120</sup> J.P. Getti & K. Lescure, *Historique du fonctionnement du Tribunal Pénal international pour l'ex-Yugoslavie*, 1 INT'L REV. PENAL L. 233 (1996); A. Péllet, *supra* note 87, at 32.

<sup>121</sup> See JONES, *supra* note 34, at 156-57.

prosecuting, and preparing indictments of alleged criminals.<sup>122</sup> Both the Chambers and the Prosecutor are served by the Registry, which is responsible for all administrative matters relating to the International Tribunal.<sup>123</sup>

In an attempt to balance efficiency concerns with the requirements of due process, the Statute provides for three Trial Chambers that may conduct proceedings simultaneously.<sup>124</sup> Because the Statute does not provide for a separate judicial body to review indictments, the Trial Chamber performs this and other pretrial functions, such as issuing arrest warrants and other orders.<sup>125</sup> The existence of three Trial Chambers makes it possible for a case to be decided by a court that does not include the judge who initially considered the indictment.<sup>126</sup> This preserves the impartiality and independence of the Trial Chamber that hears and decides the case, ensuring a decision based on the evidence admitted at trial without the bias created by having the same body confirm the charges contained in the indictment.<sup>127</sup> The Trial Chamber may convict only when the evidence establishes the accused's guilt beyond a reasonable doubt.<sup>128</sup>

The Statute provides for the right of appeal by creating two levels of jurisdiction within the Chambers.<sup>129</sup> This distinguishes the Statute from the Nuremberg Charter, which did not provide for the right of appeal to a higher judicial body. The Nuremberg Tribunal was the highest court of international criminal law which made its judgments final. Although the right to an appeal makes the judicial

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<sup>122</sup> *Id.* at 164-69.

<sup>123</sup> *Id.* at 166. The use of different terms in different legal systems made the naming of the institutional structure as a whole more difficult than the naming of its three branches. The term "tribunal" was selected to encompass both the structure as a whole and its component parts. The use of this term was based partly on the Nuremberg and Tokyo precedents and partly on the desire to distinguish the ad hoc Tribunal for the Former Yugoslavia from the efforts to establish a permanent international criminal court.

<sup>124</sup> JONES, *supra* note 34, at 154-57. In 1993, there were only two Trial Chambers, but a third was added in 1998. *Id.* at 40, 162.

<sup>125</sup> *Id.* at 265-66.

<sup>126</sup> REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 22, 23-24 (1993).

<sup>127</sup> *Id.*

<sup>128</sup> See 1 MORRIS & SCHARF, *supra* note 6, at 223-93.

<sup>129</sup> ICTY Statute, *supra* note 81, art. 25; JONES, *supra* note 34, at 195-96.



proceedings of the International Tribunal more expensive and time-consuming, it is consistent with important developments in human rights law since the Nuremberg trial. The right to appeal a criminal conviction and sentence to “a higher court according to law” is an internationally recognized human right. It has been recognized by the International Covenant on Civil and Political Rights,<sup>130</sup> which established a minimum standard of process, as essential to guaranteeing a fair trial before any national or international court or tribunal.

The office of the Prosecutor is an extremely important organ within the International Tribunal.<sup>131</sup> Since the Prosecutor initiates the proceedings before the Tribunal, she is probably the most visible and most active of all its functionaries. She initiates the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since January 1, 1991.<sup>132</sup> The Prosecutor has discretion as to whether to prosecute or not and is the sole arbiter of this matter.<sup>133</sup> She initiates the investigation *ex officio*.<sup>134</sup> During the investigation phase, the Prosecutor has the power to question suspects, victims, and witnesses, to collect evidence, and to conduct on-site investigations.<sup>135</sup> In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.<sup>136</sup>

If the Prosecutor is satisfied that there is sufficient evidence to support a reasonable belief that a suspect committed an offense within the Tribunal’s jurisdiction, she must prepare an indictment.<sup>137</sup> Under Rule 47 “the indictment shall set forth the

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<sup>130</sup> JONES, *supra* note 34, at 195-96.

<sup>131</sup> See Morten Bergsmo et al., *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 121, 127 (L. Arbour et al. eds., 2000); Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 541 (1994).

<sup>132</sup> ICTY Statute, *supra* note 81, art. 16; JONES, *supra* note 34, at 164.

<sup>133</sup> JONES, *supra* note 34, at 167-68.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> ICTY Statute, *supra* note 81, art. 18; JONES, *supra* note 34, at 167-68.

<sup>137</sup> JONES, *supra* note 34, at 167-68.

name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."<sup>138</sup> The indictment may contain cumulative charges. Thus within a single indictment, the accused may be charged either with different facts, sometimes explained as alternatives, or with different crimes.<sup>139</sup> For example, the accused may be charged with having committed the crime directly, or with aiding or abetting, or with not prohibiting the commission of the crime, or finally with not punishing the perpetrator of the crime.<sup>140</sup> The defense often objects to this method of preparing the indictment on the basis of vagueness or lack of information contained in the indictment.<sup>141</sup> Nevertheless, the Trial Chambers have always stated that the practice of alternative and cumulative charges is not forbidden either by the Statute or by the Rules of Procedure and Evidence.<sup>142</sup> Consequently, the Prosecutor has never been obliged to set forth the facts alleged in the indictments in a more specific way.<sup>143</sup>

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<sup>138</sup> *Id.* at 265.

<sup>139</sup> *Id.* at 168-72, 265-69; *see generally* Prosecutor v. Rajic, IT-95-12-T, (ICTY Aug. 23, 1995) *available at* <http://www.un.org/icty>; Prosecutor v. Martić, IT-95-11-T, (ICTY July 25, 1995) *available at* <http://www.un.org/icty>; Prosecutor v. Tadić and Borovnica, IT-94-1-T, (ICTY Dec. 14, 1995) *available at* <http://www.un.org/icty>; Prosecutor v. Blaskić, IT-95-14-T, (ICTY Apr. 25, 1997) *available at* <http://www.un.org/icty>; Prosecutor v. Jesić and Cesić, amended, IT-95-10-PT, (ICTY Oct. 19, 1998), *available at* <http://www.un.org/icty>.

<sup>140</sup> JONES, *supra* note 34, at 170.

<sup>141</sup> *Id.* at 168-72, 267-69; *see also* Michele Caianiello, *Il processo penale nella giustizia internazionale: casi giurisprudenziali dall'esperienza dei tribunali ad hoc*, in CRIMINI INTERNAZIONALI TRA DIRITTO E GIUSTIZIA, *supra* note 87, at 137. *See generally*, Prosecutor v. Dragoljub Kunarac, Decision on defence preliminary motion on the form of the amended indictment, IT-96-23-PT (ICTY Oct. 21, 1998) *available at* <http://www.un.org/icty>; Prosecutor v. Kupreskic and others, Decision on defence challenges to form of the indictment, IT-95-16-T (ICTY May 15, 1998) *available at* <http://www.un.org/icty>; Prosecutor v. Delalić, Decision on the motion by the accused based on defects in the form of the indictment, IT-96-21-T (ICTY Nov. 15, 1996) *available at* <http://www.un.org/icty>.

<sup>142</sup> JONES, *supra* note 34, at 168-72, 267-69.

<sup>143</sup> *Id.* But *see* Prosecutor v. Blaskić, Decision on the defence motion to dismiss the indictment base upon defects in the form thereof (vagueness/lack of adequate notice of charges), § 32 (ICTY Apr. 4, 1997) *available at* <http://www.un.org/icty>. The court stated as follows:

Nothing prevents the Prosecutor from pleading an alternative responsibility (Article 7(1) or 7(3) of the Statute), but the factual allegations supporting either alternative must be sufficiently precise so

Once prepared, the indictment is formally presented to a reviewing judge.<sup>144</sup> The purpose of the review is to distinguish meritorious from nonmeritorious cases.<sup>145</sup> A meritorious case establishes a *prima facie* case.<sup>146</sup> Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue a warrant for the arrest of the accused.<sup>147</sup> Upon arrest and transfer to the seat of the Tribunal, the Prosecutor must bring the accused for arraignment before a Trial Chamber without delay.<sup>148</sup> Under Rule 62, the Trial Chamber must satisfy itself that the accused's right to counsel has been respected.<sup>149</sup> The court then reads the indictment to the accused in a language that she speaks and understands.<sup>150</sup> The court next calls upon the accused to enter a plea of guilty or not guilty.<sup>151</sup> If the accused pleads not guilty, the Registrar sets a trial date.<sup>152</sup> If the accused pleads guilty, and the Trial Chamber is satisfied that the guilty plea was informed, made voluntarily, not equivocal, and supported by a sufficient factual basis, then the Registrar will set a date for the presentencing hearing.<sup>153</sup>

According to Article 21 of the ICTY Statute, the accused is entitled to the guarantees recognized by the International Covenant on Civil and Political Rights.<sup>154</sup> These rights include the right to be presumed innocent, to be informed of the charges, the right to counsel, the right to examine witnesses or to have them examined

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as to permit the accused to prepare his defense on either or both alternatives. *The required level of precision is important, if only in order to permit the accused to demonstrate the impossibility of being held responsible both directly for his own deeds and indirectly those of his subordinates.*

*Id.* (emphasis added).

<sup>144</sup> ICTY Statute, *supra* note 81, art. 19; JONES, *supra* note 34, at 168, 172.

<sup>145</sup> JONES, *supra* note 34, at 172-73.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 178-79.

<sup>149</sup> *Id.* at 311-12.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 312, 317.

<sup>154</sup> *Id.* at 178-79.

and the right to be tried in his or her presence.<sup>155</sup> The Statute does not, however, include the right to a trial by jury.<sup>156</sup> Rather, the trial is decided by the professional judges elected to serve in the Chambers.<sup>157</sup> “The absence of a jury reduces the need for elaborate rules limiting the admissibility of hearsay evidence, requiring original documents, or excluding evidence as unduly prejudicial.”<sup>158</sup> Thus, the ICTY, which is not bound by national rules of evidence and which may admit any relevant evidence deemed to have probative value,<sup>159</sup> permits the admission of hearsay evidence.<sup>160</sup> Previous statements by the accused and other witnesses, even those gathered by the Prosecutor during the investigation phase, have been admitted without cross-examination by the defense attorney.<sup>161</sup>

As with the Nuremberg Tribunal, the procedural model built by the ICTY Statute and the ICTY Rules of Procedure and Evidence can be characterized as an “intermediate solution” between the continental and the Anglo-American systems. First, the ICTY allows methods of gathering evidence for trial other than cross-examination and confrontation.<sup>162</sup> Second, the Prosecutor is a judicial officer with the same status as the judges, as in Italy, France, Germany and most of Continental Europe.<sup>163</sup> Third, the trial in absentia is banned and the “reasonable doubt” standard is established.<sup>164</sup> Finally, cross-examination is one of the main tenets of the trial, as prescribed by both the ICTY Statute and Rules.

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<sup>155</sup> ICTY Statute, *supra* note 81, art. 21; JONES, *supra* note 34, at 178-79.

<sup>156</sup> See JONES, *supra* note 34, at 178-79.

<sup>157</sup> *Id.* at 156-58.

<sup>158</sup> REPORT ON THE INTERNATIONAL TRIBUNAL, *supra* note 126, at 26-27; see generally DAMASKA, *supra* note 38, at 35-36 (discussing the differences between the Anglo-American and Continental rules of evidence).

<sup>159</sup> JONES, *supra* note 34, at 410.

<sup>160</sup> *Id.* at 412-15.

<sup>161</sup> *Id.*; see, e.g., Prosecutor v. Dusko Tadic, IT-94-1-T (ICTY May 7, 1997) available at <http://www.un.org/icty>; Prosecutor v. Delalic et. al., IT-96-21-T (ICTY Nov. 16, 1998) available at <http://www.un.org/icty>.

<sup>162</sup> JONES, *supra* note 34, at 402-03.

<sup>163</sup> *Id.* However, it is necessary to observe that not all common law systems provide for a Prosecutor with a different *status*. For example, in Scotland and in South Africa the prosecutor is a judicial officer and does not depend on the executive power.

<sup>164</sup> JONES, *supra* note 34, at 178, 407.

*C. Final Considerations: From the Ad Hoc Tribunal to the International Criminal Court*

The close link existing between the ad hoc tribunals and the International Criminal Court (ICC) is evident in an analysis of the ICC legal materials. As with the international tribunals, the ICC was established by means of a statute.<sup>165</sup> The statute is the fundamental charter of the ICC, outlining the general lines of criminal law and procedure to be applied.<sup>166</sup> The details are left to the Rules of Procedure and Evidence, which shall enter into force upon adoption of a two-thirds majority of the members of the Assembly of States Parties.

The structure of the ICC is similar to that of the International Tribunals. Its organs are the Presidency, the Chambers (including a Pre-Trial Chamber), the Office of the Prosecutor, and the Registry.<sup>167</sup> The seat of the Court will be at the Hague in the Netherlands.<sup>168</sup>

The crimes within the jurisdiction of the Court are in principle the same as those referred to in the ICTY Statute: genocide, crimes against humanity, and war crimes including grave breaches of the Geneva Convention of 1949.<sup>169</sup> The crime of aggression is also within the Court's jurisdiction.<sup>170</sup> The crime of apartheid, meaning inhumane acts committed in an institutional regime of oppression by one racial group over another, is also included among the crimes against humanity.<sup>171</sup> War crimes are defined in a more detailed way.<sup>172</sup> The crime of aggression is subject to a later definition by the Assembly of States Parties, to be adopted by a two-thirds majority. Further elements of other crimes are to be defined by the Assembly with the same procedure. The ICC's criminal process, particularly the conduct of investigations, trials, and appeals, is similar to the proceedings established by and

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<sup>165</sup> GLOBAL WAR CRIMES TRIBUNAL COLLECTION 68 (J. Oppenheim & W. van der Wolf eds. 2000).

<sup>166</sup> *Id.* at 67-140.

<sup>167</sup> *Id.* at 86.

<sup>168</sup> *Id.* at 68.

<sup>169</sup> *Id.* at 69-75.

<sup>170</sup> *Id.* at 69.

<sup>171</sup> *Id.* at 69-70.

<sup>172</sup> *Id.* at 71-75.

experimented with in front of the International Tribunal.

The enforcement of criminal law by the International Criminal Court is likely to be as effective and fair as that enacted by the International Tribunals. It may even be better if the International Court takes heed of the errors and the defects of the Tribunals' past experiences. This possibility is not so remote, given that many of the officers operating in the International Tribunals are likely to be appointed to the permanent International Criminal Court.

#### IV. The Process Before the Permanent International Criminal Court: A General Overview

##### A. *The Procedural Model*

In 1998, the Rome Conference approved the Rome Statute.<sup>173</sup> The Rome Statute will enter into force after the deposit of the sixtieth instrument of ratification.<sup>174</sup>

When working with systems established by international charters, a procedure expert first must confront and understand the type of procedural model at issue. The procedure designed for the ad hoc International Tribunals shows the peculiar necessity of merging the different characteristics of systems far removed, if not diametrically opposed, from one another. It is necessary to find intermediate solutions that in some measure satisfy people

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<sup>173</sup> See K. Ambos, *The Legal Basis for an ICC*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT, *supra* note 131, at 3; A. Marchesi, *La corte penale internazionale: ruolo della corte e ruolo degli stati*, in CRIMINI INTERNAZIONALI TRA DIRITTO E GIUSTIZIA, *supra* note 87, at 27; A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144 (1999); G. Vassalli, *Statuto di Roma. Note sull'istituzione di una corte penale internazionale*, 261 RIVISTA DI STUDI POLITICI INTERNAZIONALI 9 (1999); M. Politi, *La Cour Pénale Internationale*, 4 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 818 (1999); D. Sarooshik, *The Statute of the International Criminal Court*, 48 INT'L & COMP. L.Q. 401 (1999); see also COLLECTION OF ESSAYS ON THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT (F. Lattanzi & W. Schabas eds., 2000); COMMENTARY ON THE ROME STATUTE, *supra* note 56; [3 Enforcement] INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 1999).

<sup>174</sup> The United States has neither subscribed nor ratified the Statute. See P. Malanczuk, *The International Criminal Court and Landmines: What Are the Consequences of Leaving the US behind?*, 11 EUR. J. INT'L L. 77 (2000); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999); G. Hafner, K. Boon, A. Rubesame and J. Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108 (1999).

accustomed to reasoning and acting according to continental or civil law systems, on the one hand, and common law systems, on the other.<sup>175</sup> A compromise procedure must be reached because the perspective from which the rules are examined will color final assessment. To a continental jurist, a process such as the one built by the Rome Statute seems to be a common law process, while common law jurists characterize it as a civil law process. The more accurate conclusion is that the merger of models has produced a result that cannot be entirely ascribed to one system or the other.

Although it opens the way for some inconsistencies at the systematic level, the blending of these two systems reveals that the common denominator for any process is fairness. The process must also comply with the fundamental principles laid down by the international covenants on human rights. The Rome Statute regularly references several international charters of rights, reproduces provisions drawn from the International Covenant on Civil and Political Rights, and generally recognizes principles of international law relating to the rights of the person.<sup>176</sup>

These references show the intention to build a process that provides strong guarantees for the accused and creates a system that could serve as a model, even in an ethical sense, for the international community.<sup>177</sup> These goals, however, have not been fully achieved. The rules adopted actually include many questionable points and unsolved problems, especially from the formalistic viewpoint of a procedural expert. Several gaps exist with respect to the protections provided to the accused. Also, the definitions of certain legal issues are often insufficient or

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<sup>175</sup> ROME STATUTE, *supra* note 2, art. 126, 37 I.L.M. at 1068; *see generally* M.R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY, *supra* note 38; M.R. DAMASKA, *Structure of Authority and Comparative Criminal Procedure*; M.R. DAMASKA, EVIDENCE LAW ADRIFT, *supra* note 38; J. Goldschmidt, *Principios Generales Del Proceso*, in 2 PROBLEMAS JURIDICOS Y POLITICOS DEL PROCESO PENAL 109-119 (1961).

In Italy there is a vast literature on the differences between the accusatorial and inquisitorial system. *See generally supra* note 38.

<sup>176</sup> Helen Brady, *Rules of Evidence and the Rome Statute of the International Criminal Court* in COLLECTION OF ESSAYS ON THE ICC 1, 4 (F. Lattanzi & W. Schabas eds. 1999).

<sup>177</sup> *Id.* at 3.

inaccurate.

The Rome Statute contains only a general outline of the criminal process before the ICC. The Statute deals only with the most significant points, while the detailed code of procedure will be issued later in the form of Rules of Procedure and Evidence, as happened with the ad hoc International Tribunals.<sup>178</sup> With the ICC, the procedure rules will be of conventional origin because the contracting States will need to approve them. This system differs from that used on previous occasions. For instance, with the ICTY, the Tribunal itself issued the procedural rules. Issuing formal law from the tribunal conforms with proceedings familiar to common law systems, but is unusual for civil law countries.

Examination of the powers of the ICC as defined by the Rome Statute reveals a broad discretion reserved to both the Prosecutor and the Court itself. As with common law systems, the ICC is not strictly bound to peremptory rules of procedural law and can adopt evaluations tending to verify whether the immediate proceedings constitute a violation of the right to a fair trial.<sup>179</sup> Civil law systems, on the contrary, operate according to formal criteria of validation of procedural acts. In other words, the control given to the judge is used exclusively to ascertain whether the act was done in conformity with the form provided for by law. If a violation occurred, the civil law system does not provide for the judge to inquire as to whether actual prejudice resulted.<sup>180</sup>

### *B. Relationship Between International Rules and Internal Law*

The ICC also requires an interdisciplinary approach in areas where procedural law, substantive criminal law, and international law overlap. At the same time, it is necessary to coordinate the rules governing the processes before the ICC and the internal law of the contracting States.

A meaningful example concerns the problem of cooperation of each State with the International Criminal Court.<sup>181</sup> The ICC has

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<sup>178</sup> *Id.* at 1-2.

<sup>179</sup> *Id.* at 12.

<sup>180</sup> See M.R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY*, *supra* note 38, at 186-226.

<sup>181</sup> See Bruce Broomhall, *The International Criminal Court: Overview, and*



the authority to request that a State execute certain acts or take particular measures.<sup>182</sup> Questions arise as to what happens when the requested act, or the manner in which its execution should be carried out, is not permitted under the internal law of the State. The Rome Statute, in a general way, provides for some forms of settlement in the event of a conflict between a request from the ICC and the internal procedural law.<sup>183</sup> Article 99 of the Statute reads as follows: "Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request."<sup>184</sup> This means that if a positive prohibition to execute the act or to execute it in the specified manner does not exist, a departure from the internal law must be allowed.

Moreover, a particular proceeding is provided to foster agreement between the State and the Court on the execution of a request. In the end, however, if the conflict is insuperable, the internal law prevails. Attention must be paid to Article 88 of the Rome Statute, which provides that national laws shall be enacted to provide assistance to the ICC: "States Parties shall ensure that there are procedures available under their national law for all the forms of cooperation which are specified [in the Rome Statute]."<sup>185</sup> In other words, internal law must establish how to comply with requests for cooperation from the ICC. An example of this type of enabling law was enacted in Italy in 1994, in relation to the ad hoc ICTY.<sup>186</sup> This Italian statute contains a provision that could be useful in guiding the establishment of the relationship between the jurisdictions of the ICC and the Italian courts. According to Article 10 of the statute, the execution of the acts required by the ICTY is governed by the rules of the Italian code of criminal procedure, except where there is a need to comply with the forms expressly required by the ICTY, so long as those provisions are

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*Cooperation with States, in ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION* 45, 86 (1999).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 90.

<sup>184</sup> ROME STATUTE, *supra* note 2, art. 99, 37 I.L.M. at 1059-60.

<sup>185</sup> ROME STATUTE, *supra* note 2, art. 88, 37 I.L.M. at 1052.

<sup>186</sup> G. Vassalli, *supra* note 28, at 335.

not contrary to the principles of Italy's legal system.<sup>187</sup>

This statute establishes the machinery for settlement of potential conflicts. In most instances, the Italian law applies. The ICTY may, however, give specific instructions, which, according to Article 10, must be observed.<sup>188</sup> These instructions are applicable even if they deviate from the rules of the Italian code of criminal procedure. However, ICTY action is not permitted if it contradicts the principles of the Italian legal system.<sup>189</sup>

Despite provisions of this type, conflict of law problems persist, especially in determining the principles of a State's legal system. For example, a request from the ICTY should be denied if it requires the execution of an activity contrary to the Italian Constitution. Moreover, determining what violates the Italian Constitution is a matter of interpretation. Often, however, Italian law provides sufficiently precise guidelines to handle requests of cooperation by international courts.

### C. Prosecution

One of the most significant and politically relevant aspects of ICC procedure concerns the responsibility for prosecution.<sup>190</sup> The Rome Statute provides that when a crime falling within the jurisdiction of the Court is committed, the situation may be referred to the Prosecutor by the Security Council of the United Nations<sup>191</sup> or by a State Party.<sup>192</sup> Moreover, the Prosecutor can initiate an investigation upon receipt of any information about the crime.<sup>193</sup> The acknowledgment of the power to launch *ex officio* investigations was particularly valued by non-governmental organizations supporting the establishment of the ICC in order to avoid State interference with the Prosecutor's actions. The Security Council does, however, have the power to obtain the

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<sup>187</sup> Art. 10, para. 4, L. Feb. 14, 1994, n.120, published in *Gazzetta Ufficiale* Feb. 22, 1994, 5 n.43.

<sup>188</sup> *Id.*

<sup>189</sup> See G. Vassalli, *supra* note 28, at 337.

<sup>190</sup> S. Zappalà, *Il Prosecutor della Corte penale internazionale: luci e ombre*, RIVISTA DI DIRITTO INTERNAZIONALE 39 (1999).

<sup>191</sup> ROME STATUTE, *supra* note 2, art.13, 37 I.L.M. at 1010-11.

<sup>192</sup> *Id.* art. 14, 37 I.L.M. at 1011.

<sup>193</sup> *Id.* art. 15, 37 I.L.M. at 1011.

deferral of an investigation or prosecution by adopting a resolution under Chapter VII of the Charter of the United Nations.<sup>194</sup> Chapter VII applies when peace and international security are endangered.<sup>195</sup>

The ICC determines the admissibility of a case based either on its own motion or on challenge by the accused or by a qualified State.<sup>196</sup> Article 17 of the Rome Statute outlines the numerous conditions for admissibility.<sup>197</sup>

The most important of these conditions are those related to the central principle of complementarity<sup>198</sup> contained in the Preamble and in Article 1 of the Rome Statute.<sup>199</sup> Complementarity refers to the relationship between the jurisdiction of the ICC and the jurisdiction of the national courts of the States Parties.<sup>200</sup> The national criminal jurisdiction has priority over the jurisdiction of the ICC, unless the State is unwilling or unable to prosecute the crime. Therefore, the ICC has no jurisdiction if the case is being investigated or has been investigated by the State.<sup>201</sup> The same principle applies to *ne bis in idem* (protection against double jeopardy). No person shall be tried before the court if already convicted or acquitted for the same conduct by the Court itself, or by another court (such as a national one).<sup>202</sup> The case is admissible before the Court, however, when the national proceedings either were held to shield the accused from criminal responsibility or were not conducted independently or impartially.<sup>203</sup>

A different situation occurs when the case is not considered sufficiently grave to justify further action by the Court. This is not an issue of admissibility, however, but rather a judgment on the

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<sup>194</sup> *Id.* art. 16, 37 I.L.M. at 1012.

<sup>195</sup> U.N. CHARTER, ch. VII.

<sup>196</sup> ROME STATUTE, *supra* note 2, art. 19, 37 I.L.M. at 1013-14.

<sup>197</sup> *Id.* art. 17, 37 I.L.M. at 1012.

<sup>198</sup> See Broomhall, *supra* note 182, at 79-82; S. Zappalà, *supra* note 191, at 42. On this subject, see also all the authors mentioned above, *supra* note 174.

<sup>199</sup> ROME STATUTE, *supra* note 2, Preamble & art. 1, 37 I.L.M. at 1002-03.

<sup>200</sup> Broomhall, *supra* note 182, at 79.

<sup>201</sup> ROME STATUTE, *supra* note 2, art. 17(1)(a), 37 I.L.M. at 1012; see also Broomhall, *supra* note 182, at 81.

<sup>202</sup> ROME STATUTE, *supra* note 2, art. 20, 37 I.L.M. at 1014-15.

<sup>203</sup> *Id.* art. 20(3), 37 I.L.M. at 1014-15.

merits of the case, albeit a provisional one. As with the aforementioned situations, this decision may be reviewed at the request of the Prosecutor when new facts arise.<sup>204</sup>

Prosecution before the ICC is based on the principle of opportunity,<sup>205</sup> in contrast to procedures in some European countries, such as Germany and Italy, which base prosecution on the principle of legality.<sup>206</sup> Mandatory prosecution is inconsistent with the scope of jurisdiction granted to the ICC. Every crime that falls within ICC jurisdiction is not expected to be tried. Therefore, it is necessary for the Prosecutor to have the power to select the individuals to be indicted and the charges to be brought.

The problem is that the Prosecutor's discretion is extremely broad and may prove difficult to control. The Prosecutor may refrain from initiating an investigation if the legal or factual basis is lacking,<sup>207</sup> or if, "[t]aking into account the gravity of the crime and the interests of [the] victims," there are "substantial reasons to believe that an investigation would not serve the interests of justice."<sup>208</sup> Although it is clear that this provision represents an indispensable safety valve for the Prosecutor's actions, it also

<sup>204</sup> *Id.* art. 19(10), 37 I.L.M. at 1014.

<sup>205</sup> See Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 244 (1977) (explaining that the principle of opportunity provides that the "prosecuting attorney shall receive complaints and denunciations and decide what to do with them" (quoting THE FRENCH CODE OF CIV. P. art. 40)); see also FRANK MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969) (analyzing decision-making power of prosecutors based on the report of the American Bar Foundation's survey of the administration of justice in the United States); W.R. La Fave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970) (discussing the broad range of largely uncontrolled discretion exercised by prosecutors in the United States; see generally MARIO CHIVARAO, L'AZIONE PENALE TRA DIRITTO E POLITICA, (1995); FERRAJOLI, *supra* note 38, at 579-83.

<sup>206</sup> Goldstein & Marcus, *supra* note 206, at 247 (explaining that the principle of legality "makes prosecution compulsory and discretion in charging impermissible unless specifically authorized by statute"); see also Andrew Ashworth, *The "Public Interest" Element in Prosecutions*, CRIM. L. REV. 595, 595 (1987) (developing the element of England's Code for Crown Prosecutors that inquires "whether the public interest requires a prosecution"); see generally ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY (1994); CHIAVARIO, *supra* note 206; FERRAJOLI, *supra* note 38, at 579-83.

<sup>207</sup> ROME STATUTE, *supra* note 2, art. 53(1)(a), 37 I.L.M. at 1029.

<sup>208</sup> *Id.* art. 53 (1)(c), 37 I.L.M. at 1029.

grants the Prosecutor power that is almost absolute and essentially makes her the fundamental organ of the ICC.<sup>209</sup> Because the judge may act only if the Prosecutor pursues the case, the Prosecutor is the master of the process. She holds the key to its triggering mechanism. There is no question about the utility of discretionary power, but the discretion here is extremely broad and allows the Prosecutor to make evaluations that, strictly speaking, go beyond the task of prosecuting crimes.

In this context the Prosecutor clearly holds a great deal of power with remarkable political significance. Thus, the rules regulating the qualification and selection of the Prosecutor are essential, as is the institutional position of the Prosecutor's Office. According to the terms of the Rome Statute, the Prosecutor shall be elected by secret ballot by an absolute majority of the Assembly of States Parties,<sup>210</sup> and shall be a person "of high moral character."<sup>211</sup> The Office of the Prosecutor "shall act independently as a separate organ of the Court."<sup>212</sup> Therefore the Office belongs to the ICC, but is separated from the judges. The members of the Office of the Prosecutor "shall not seek or act on instructions from any external source."<sup>213</sup> This provision refers, above all, to external influence by the States.

Judges may review the Prosecutor's decision not to initiate an investigation or prosecution where the Prosecutor believes that the interests of justice would not be served. These judges, who sit in the Pre-Trial Chamber that supervises the preliminary investigations, exercise limited control over the Prosecutor's discretion.<sup>214</sup> The Prosecutor must inform the Pre-Trial Chamber of her determination not to initiate an investigation if it is based solely on the evaluation of "the interests of justice."<sup>215</sup> The

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<sup>209</sup> See Leila Sadat Wexler, *A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court*, in [3 ENFORCEMENT] INTERNATIONAL CRIMINAL LAW, *supra* note 173, at 673.

<sup>210</sup> ROME STATUTE, *supra* note 2, art. 42(4), 37 I.L.M. at 1024.

<sup>211</sup> *Id.* art.42(3), 37 I.L.M. at 1024.

<sup>212</sup> *Id.* art 42(1), 37 I.L.M. at 1024.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* art. 53, 37 I.L.M. at 1029-30.

<sup>215</sup> *Id.* art. 53(2)(c), 37 I.L.M. at 1029.

Prosecutor must also inform the Pre-Trial Chamber of a conclusion that there is no basis to prosecute and give reasons for this decision.<sup>216</sup> In the latter case, the Prosecutor must also report the information to the State or the Security Council that referred the crime.<sup>217</sup> The Pre-Trial Chamber, at the request of the State or the Security Council, may review the decision of the Prosecutor and may request that the Prosecutor reconsider it. In addition, the Pre-Trial Chamber may review the Prosecutor's decision on its own initiative, in which case the decision will be effective only if confirmed.<sup>218</sup>

The Statute does not specify the consequences of non-confirmation. In the Italian system, when the judge does not grant leave to dismiss a case, she can order the prosecutor to file an indictment. A solution like that, however, would be atypical in a system where the prosecution is based on the principle of opportunity. Additionally, that solution would probably be inconsistent with the Prosecutor's independence from the judges, as is expressly provided for by the Rome Statute. But even when the Prosecutor is simply invited to reconsider her decision, it is not clear to what extent a discretionary choice is still allowed.

Apparently, a legal solution does not exist. On one hand, the judge is not empowered to order the prosecution to bring an action and, on the other hand, the review of the Prosecutor's decision must have consequence. The only reasonable resolution is a political one. If the conflict with the Pre-Trial Chamber is insuperable, the Prosecutor may be forced to resign, since she can neither ignore the judge's opinion nor be forced to take action.<sup>219</sup>

#### *D. Preliminary Investigations*

Preliminary investigations are carried out by the Prosecutor. A peculiar feature, reminiscent of civil law systems, is found in Article 54(1)(a) of the Rome Statute: the Prosecutor "in order to establish the truth, [shall] extend the investigation to cover all facts and evidence relevant to an assessment of whether there is . . . criminal responsibility . . . and, in doing so, [shall] investigate

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<sup>216</sup> ROME STATUTE, *supra* note 2, art. 53(2)(a), 37 I.L.M. at 1029.

<sup>217</sup> *Id.* art. 53(2), 37 I.L.M. at 1029.

<sup>218</sup> *Id.* art. 53(2)(b), 37 I.L.M. at 1029.

<sup>219</sup> See Broomhall, *supra* note 182, at 68-71.

incriminating and exonerating circumstances equally.”<sup>220</sup> In other words, the Prosecutor is bound to be objective and to discover the truth, similar to the investigating judge (*judge d’instruction*) used in the French and other continental systems.<sup>221</sup> At least in theory, Italian prosecutors are also required to be impartial, but practically this means only that they must not disregard evidence favorable to the suspect when investigating crimes and charging the accused.

In particular, the Prosecutor has the power to collect evidence, to question victims, witnesses, and persons being investigated, to request the usually indispensable cooperation of any State, and to conclude relevant agreements with the States.<sup>222</sup> Confidential information must be kept secret and protective measures may be used for this purpose.<sup>223</sup> Measures may also be taken to ensure the protection of any person and the preservation of evidence.<sup>224</sup>

The Prosecutor must inform the Pre-Trial Chamber when an investigation is deemed to present “a unique opportunity . . . which may not be available subsequently” to take testimony or collect evidence.<sup>225</sup> The Pre-Trial Chamber may then take necessary measures to collect or preserve evidence and, in particular, to protect the rights of the defense.<sup>226</sup> Attendance of counsel must be authorized and is, therefore, not automatically provided.<sup>227</sup> Moreover, the Rome Statute does not set in advance the procedures to be followed, including obligation to make a record. These procedures are determined on a case-by-case basis at the discretion of the Pre-Trial Chamber.<sup>228</sup> The Pre-Trial Chamber may, however, act on its own initiative, in consultation with the Prosecutor, to take measures required to preserve evidence essential for the defense at trial.<sup>229</sup>

With regards to coercive measures, such as arrest warrants, the

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<sup>220</sup> ROME STATUTE, *supra* note 2, art. 54(1)(a), 37 I.L.M. at 1030 .

<sup>221</sup> Zappalà, *supra* note 191, at 48.

<sup>222</sup> ROME STATUTE, *supra* note 2, art. 54(3)(a-d), 37 I.L.M. at 1030.

<sup>223</sup> *Id.* art. 54(3)(e), 37 I.L.M. at 1030.

<sup>224</sup> *Id.* art. 54(3)(f), 37 I.L.M. at 1030.

<sup>225</sup> *Id.* art. 56(1)(a), 37 I.L.M. at 1031; *see also* Broomhall, *supra* note 182, at 71.

<sup>226</sup> ROME STATUTE, *supra* note 2, art. 56, 37 I.L.M. at 1031-32.

<sup>227</sup> *Id.* art. 56(2)(d), 37 I.L.M. at 1032.

<sup>228</sup> *Id.* art. 56(2-3), 37 I.L.M. at 1031-32.

<sup>229</sup> *Id.* art. 56(3)(b), 37 I.L.M. at 1032.

Prosecutor has no independent powers and must act through application to the Pre-Trial Chamber.<sup>230</sup> An arrest warrant may be issued when there are reasonable grounds to believe that the person committed a crime within the jurisdiction of the ICC and the arrest is necessary to meet one of the following conditions: to ensure the person's appearance at trial, to prevent the person from obstructing or endangering the investigation or trial, or to prevent the person from continuing the commission of that or a related crime.<sup>231</sup> A summons may be substituted for an arrest warrant when there are reasonable grounds to believe that it will be sufficient to ensure the person's appearance.<sup>232</sup>

The Pre-Trial Chamber exerts all subsequent control on the coercive measures adopted and may act on its own initiative in doing so. It may release a detainee, with or without conditions, and it must periodically review its rulings on releases and detentions.<sup>233</sup> In particular, because the Statute does not provide for a time limit of pre-trial detention, the Pre-Trial Chamber "shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor."<sup>234</sup>

#### *E. Indictment and Confirmation*

On the basis of the arrest warrant, the Court may request either the provisional arrest or the arrest and surrender of an individual.<sup>235</sup> The arrest warrant is executed by the State that receives the request in accordance with its duty of cooperation with the ICC.<sup>236</sup> The national judicial authority may determine only whether the warrant has been lawfully issued and may not review the merits of the case or the substantive grounds for the Court's decision.

Within a reasonable time after the person's surrender or voluntary appearance before the ICC, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor

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<sup>230</sup> *Id.* art 58(1), 37 I.L.M. at 1033.

<sup>231</sup> *Id.*

<sup>232</sup> ROME STATUTE, *supra* note 2, art. 58(7), 37 I.L.M. at 1034.

<sup>233</sup> *Id.* art. 60, 37 I.L.M. at 1035.

<sup>234</sup> *Id.* art. 60(4), 37 I.L.M. at 1035.

<sup>235</sup> *Id.* art. 58(5), 37 I.L.M. at 1034.

<sup>236</sup> *Id.* art. 59(1), 37 I.L.M. at 1034.



intends to seek trial.<sup>237</sup> The Rome Statute, however, does not specify which office initiates the hearing. It is also not clear exactly when the process moves from the investigation phase to the prosecution phase. The time frame is not set in which the Prosecutor, after closing the investigation, must decide whether to file an indictment or dismiss the case.

Apparently, the request of a warrant of arrest or a summons to appear should always lead to a confirmation hearing. At a confirmation hearing, the Prosecutor has to file the charges on which he intends to bring the suspect to trial.<sup>238</sup> Logically then, the prosecution begins with the appearance of the individual before the judge. However, the Rome Statute does not state that the charges must be related to the same crime alleged in the application for the warrant, and no indication is made as to what happens if the application has been rejected.

By contrast, the current procedure for the ICTY is more straightforward.<sup>239</sup> If, upon investigation, the Prosecutor is satisfied that there is sufficient evidence, she prepares and submits to the judge an indictment for confirmation, regardless of the suspect's position.<sup>240</sup> Upon confirmation, the judge may issue an arrest warrant.<sup>241</sup> If the Prosecutor seeks provisional detention of the suspect during the investigation, a provisional charge must be submitted to the judge.<sup>242</sup>

The uncertainty with which the Rome Statute outlines the methods of charging and the beginning of the prosecution most

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<sup>237</sup> *Id.* art. 61(1), 37 I.L.M. at 1035.

<sup>238</sup> ROME STATUTE, *supra* note 2, art. 61(5), 37 I.L.M. at 1036.

<sup>239</sup> M. Bergsmo et al., *The Prosecutors of Yugoslavia*, in THE LEGAL BASIS FOR AN ICC 121-55 (L. Arbour et al. eds., 1988); Nsereko, *supra* note 130, at 541; *see generally* Prosecutor v. Dragoljub Kunarac, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, IT-96-23-PT (ICTY Oct. 20, 1998), *available at* <http://www.un.org/icty>; Prosecutor v. Kupreskic et. al., Decision on Defence Challenges to Form of the Indictment, IT-95-16-T, (ICTY May 15, 1998), *available at* <http://www.un.org/icty>; Prosecutor v. Delalic et al., Decision on the Motion by the Accused Based on Defects in the Form of the Indictment, IT-96-21-T (ICTY Oct. 2, 1996), *available at* <http://www.un.org/icty/ind-e.htm>; *see generally* JONES, *supra* note 34, at 181-188; Caianiello, *supra* note 141, at 137.

<sup>240</sup> ROME STATUTE, *supra* note 2, art. 61, 37 I.L.M. at 1035-37.

<sup>241</sup> *See id.* art. 61(11), 37 I.L.M. at 1037.

<sup>242</sup> *Id.* art. 60, 37 I.L.M. at 1035.

likely stem from the need to reconcile competing interests. The Statute attempts to guarantee the defendant's rights while at the same time protecting the indictment so that the accused does not have the opportunity to evade trial by escaping to a State incapable of or not obliged to cooperate with the ICC. It is essential, therefore, that the presence of the individual be ensured so that the confirmation hearing may be held. This normally happens through the arrest of the person, though other measures are possible if necessary to obtain her appearance.

A reasonable conclusion is that the charges can be brought only against a person under arrest or summons. This means that if charges are brought, the Pre-Trial Chamber has already made a preliminary evaluation of the evidence to establish reasonable grounds to believe that the person has committed the crimes. On the contrary, if the warrant of arrest or the summons has been denied, the Prosecutor cannot bring charges against the individual.

The confirmation hearing takes place in the presence of the Prosecutor, the person charged and her counsel.<sup>243</sup> The suspect must be informed in advance of the charges and of the evidence on which the Prosecutor intends to rely.<sup>244</sup> At the hearing, the suspect may object to the charges, challenge the evidence presented by the Prosecutor, and present evidence on her behalf.<sup>245</sup> As for the Prosecutor, she may rely on documentary or summary evidence and is not required to call witnesses.<sup>246</sup> If it is satisfied that "there is sufficient evidence to establish substantial ground to believe that the person committed each of the crimes charged," the Pre-Trial Chamber confirms the charges and commits the person to a Trial Chamber for trial.<sup>247</sup>

The hearing can be held in the absence of the person charged only if she has waived the right to be present, or if she has fled or cannot be found, meaning a warrant or a summons was issued having no effect.<sup>248</sup> If the suspect has fled or cannot be found, all reasonable steps must have been taken to secure her appearance

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<sup>243</sup> *Id.* art. 61(1), 37 I.L.M. at 1035.

<sup>244</sup> *Id.* art. 61(3), 37 I.L.M. at 1036.

<sup>245</sup> *Id.* art. 61(6), 37 I.L.M. at 1036.

<sup>246</sup> ROME STATUTE, *supra* note 2, art. 61(5), 37 I.L.M. at 1036.

<sup>247</sup> *Id.* art. 61(7), 37 I.L.M. at 1037-38; Broomhall, *supra* note 182, at 72.

<sup>248</sup> ROME STATUTE, *supra* note 2, art. 61(2), 37 I.L.M. at 1036.

and to inform her of the hearing and the charges.<sup>249</sup> In such cases, the absent person may be represented by counsel, but this right is subject to discretionary review by the Pre-Trial Chamber to determine whether it is in the interest of justice.<sup>250</sup>

*F. The Trial Stage and the Admission of Evidence*

The trial before the Trial Chamber shall be held in the presence of the accused. The accused can be removed by the Court only if she disrupts the trial. In that situation, she shall be allowed to observe the trial and instruct counsel from outside the courtroom, even if the use of communications technology is required to do so.<sup>251</sup> Trial *in absentia* (without the presence of the accused) is not allowed. This provision is a feature usually ascribed to common law systems, although it is present elsewhere as well. Trial *in absentia* is considered to be a violation of the defendant's right to confrontation.<sup>252</sup> Additionally, trials shall be held in public unless the Court decides that the proceedings should be held in closed session to protect confidential information, victims, witnesses or even the accused.<sup>253</sup>

The presentation of evidence is, in principle, up to the parties. The Court rules on the relevance and admissibility of any evidence according to criteria that ensure broad discretion. Criteria for these rulings appear merely as an indication. Article 69 provides that the Court shall take into account, among other things, "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness."<sup>254</sup> These criteria imply an appraisal that mixes procedural issues with a judgment on the merits, because in a trial before the ICC, unlike with a jury trial, there is no separation of questions of fact and questions of law. With regard to this, however, the Rome Statute contains an explicit reference to the Rules of Procedure and Evidence, which are supposed to provide further

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* art 63, 37 I.L.M. at 1037.

<sup>252</sup> See P. Sob, *The Dynamics of International Criminal Tribunal*, 67 NORDIC J. INT'L L. 139 (1998).

<sup>253</sup> ROME STATUTE, *supra* note 2, art. 64(7), 37 I.L.M. at 1038.

<sup>254</sup> *Id.* art. 69(4), 37 I.L.M. at 1042.

specifications.

The Court has the power to admit evidence on its own initiative. The Court has the authority to request the submission of all evidence that it considers "necessary for the determination of the truth."<sup>255</sup> Furthermore, it may "order the production of evidence in addition to that already collected prior to the trial or presented during the trial."<sup>256</sup> These powers may be seen as inquisitorial, particularly because they are stated in generic terms without reference to the results achieved on the basis of party initiative. As a consequence, the judges' impartiality may be prejudiced.

Witnesses before the ICC give their testimony in person.<sup>257</sup> However, the Court may adopt measures to protect witnesses.<sup>258</sup> Such measures may vary from the previously mentioned exclusion of the public, to the presentation of evidence by electronic or other special means, to any other measure that the Court deems appropriate under the circumstances.<sup>259</sup> The measures chosen must not be either prejudicial to the rights of the accused or inconsistent with a fair and impartial trial.<sup>260</sup> The Statute does not take a definite position on the admissibility of anonymous testimony whereby a person's identity is kept secret. This topic has been a controversial issue for a long time. It seems that the question is left to a case-by-case balancing between security needs and protection of the defendant's rights, with the final determination made by the judge.

As for the exceptions to giving oral evidence, the Rome Statute does provide for the admissibility of documents and

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<sup>255</sup> *Id.* art. 69(3), 37 I.L.M. at 1042.

<sup>256</sup> *Id.* art. 64(6)(d), 37 I.L.M. at 1038.

<sup>257</sup> *Id.* art. 69(2), 37 I.L.M. at 1041-42.

<sup>258</sup> *Id.* art. 68, 37 I.L.M. at 1041 (providing court authority to protect the physical and psychological condition of a witness through measures that may include increased security, *in camera* hearings, and appropriate counseling); *see also* Prosecutor v. Blaskic, Decision on the Application of the Prosecutor dated 17 Oct. 1996 requesting protective measures for victims and witnesses, IT-95-14-T, (ICTY Nov. 5, 1996) *available at* <http://www.un.org/icty>; Prosecutor v. Dusko Tadic, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, (IT-94-1-T), (ICTY Aug. 10, 1995) *available at* <http://www.un.org/icty>; Caianiello, *supra* note 142, at 151; Andre Klip, *Witnesses before the International Criminal Tribunal for the Former Yugoslavia*, 67 INT'L REV. PENAL L. 267 (1996).

<sup>259</sup> ROME STATUTE, *supra* note 2, art. 68, 37 I.L.M. at 1041.

<sup>260</sup> *Id.* art. 68(1), 37 I.L.M. at 1041.

written transcripts.<sup>261</sup> Nothing is stated about the use of previous statements recorded by the Prosecutor as evidence, save further reference to the Rules of Procedure and Evidence. As already stated, Article 56 of the Rome Statute allows the Pre-Trial Chamber to take a deposition in the case of a unique opportunity which may not be available subsequently. The admissibility and probative value of this evidence will be weighed by the Trial Chamber.<sup>262</sup>

Therefore, the question of admissibility of out of court statements remains open. The Rome Statute provides little guidance on evidence matters, making it necessary to await the actual regulation resulting from the forthcoming Rules of Procedure and Evidence. The rules adopted by the ICTY and their judicial application allow a wide use at trial of statements recorded during the investigation stage.<sup>263</sup> The hearsay exclusion does not strictly apply in that international tribunal.<sup>264</sup>

This decision has been justified with the explanation that, in the absence of a jury, a Court composed only of professional judges should be able to distinguish the probative value of the different pieces of evidence and therefore should not run the risk of overvaluing evidence not submitted to cross-examination.<sup>265</sup> This explanation does not, however, take into account that the Prosecutor carries out the questioning of witnesses whose statements are recorded without the assistance of counsel. This one-sided questioning certainly causes disparity between the parties when that information is used as direct evidence at trial.

### *G. Exclusion of Evidence*

With regard to the exclusion of evidence, the applicable rules are more similar to that of civil law systems, where the Court also sits without a jury as the trier of fact and determiner of the admissibility of evidence. As in continental systems, including the

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<sup>261</sup> *Id.* art. 69(2), 37 I.L.M. at 1041-42.

<sup>262</sup> *Id.* art. 56(4), 37 I.L.M. at 1032.

<sup>263</sup> *See Brady, supra* note 177, at 14.

<sup>264</sup> *See id.*; *see also* Prosecutor v. Delalic et al., Decision on the Motion of the Prosecutor for the Admissibility of Evidence, IT-96-21-T (ICTY Jan. 19, 1998) available at <http://www.un.org/icty>.

<sup>265</sup> *Brady, supra* note 177, at 15.

Italian one, the Rome Statute provides that the decision of the Trial Chamber "shall contain a full and reasoned statement of the . . . findings on the evidence and conclusions."<sup>266</sup> In other words, the decision should include an explanation of the reasons for the admission and exclusion of evidence.

The rules of exclusion, however, are not peremptory, as they are subject to a discretionary evaluation by the judge. The violation of a legal prescription does not suffice to exclude evidence, because it is necessary to verify that the violation has actually caused harm.<sup>267</sup> Consequently, the rule is more flexible and in some respects more functional because it allows the judge to disregard violations deemed to be insignificant. This approach differs substantially from a formal system, like the Italian one, that incorporates predefined violations and correspondent procedural remedies. From a continental point of view, entrusting the decision entirely to a judge's discretion weakens the certainty of the rules and the predictability of their effects, making it more difficult to prepare a defense strategy.

Two of the exclusion criteria contained in Article 69 overlap with each other in providing certain procedural protections.<sup>268</sup> Evidence unlawfully obtained shall not be admissible if: "(a) [t]he violation casts substantial doubt on the reliability of the evidence; or (b) [t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."<sup>269</sup> The first provision requires that the outcome be taken into account, so that the evidence is excluded if the violation of the rules makes it unreliable. This provision acts as a safeguard for the rightness of the judgment. The second provision recognizes the necessity of protecting the rights of the parties, and in particular the fundamental rights of the individual, by limiting the exercise of penal jurisdiction powers. For example, a coerced confession should be excluded on grounds of unreliability. Even if it would be reliable, however, it should still be excluded, because its admission would seriously damage the integrity of the proceedings.

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<sup>266</sup> ROME STATUTE, *supra* note 2, art. 74(5), 37 I.L.M. at 1045.

<sup>267</sup> Brady, *supra* note 177, at 12.

<sup>268</sup> ROME STATUTE, *supra* note 2, art. 69(7), 37 I.L.M. at 1042.

<sup>269</sup> *Id.*

The procedural rules incorporated into the Rome Statute arise from numerous sources. The first of the rules to be complied with are those contained in the Rome Statute itself. The Rome Statute outlines several principles regarding the presentation of evidence, with the expectation that they will be more fully defined by the Rules of Procedure and Evidence. The Statute rules guaranteeing the rights of the accused are particularly relevant in this context.

Another source of procedural rules is the phrase “internationally recognized human rights,” with specific reference to the rights set forth in the international charters on human rights.<sup>270</sup> However, with the criminal process such guarantees have been almost entirely acknowledged within the Rome Statute, so that this particular provision has little more than residual value.

At first glance, it would appear that possible violations of the national law of the state where evidence has been collected are irrelevant to the workings of the ICC. Article 69(8) of the Rome Statute precludes the Court from ruling on the application of a state’s national law.<sup>271</sup> But this does not apply to national laws intended to guarantee human rights. When a state’s assistance is requested, the taking of evidence is subject to national law. In case of a conflict, the national law must prevail. This concept has been formally articulated in the law of several continental countries including Italy. Therefore, a procedure must be legal under a state’s domestic standards to be required by the ICC.

#### *H. Rights of the Accused*

Specific attention is devoted by the Rome Statute to safeguarding the rights of the accused person, with reference both to the investigations stage preceding the indictment, and to the trial stage. The rights of the accused are essentially the same as those recognized by international charters, in particular by the 1966 Covenant on Civil and Political Rights (the Covenant).<sup>272</sup>

According to the Covenant, the suspect is first entitled to the

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.* art. 69(8), 37 I.L.M. at 1042.

<sup>272</sup> 1966 Covenant on Civil and Political Rights, U.N. Doc. A/C 3/SR. (1966), 6 I.L.M. 368 [hereinafter Covenant]; see also Christopher L. Blakesley, *Comparing the Ad hoc Tribunal for Crimes Against Humanitarian Law in the Former Yugoslavia & The Project for an International Criminal Court*, 67 INT’L REV. OF PENAL L. 143, 195 (1996); Wexler, *supra* note 209, at 675.

privilege against self-incrimination, that is, he shall not be "compelled to testify against himself or to confess guilt."<sup>273</sup> Moreover, the person shall not be subjected to torture or any other form of inhuman or degrading treatment,<sup>274</sup> nor shall she be subjected to arbitrary arrest or detention.<sup>275</sup> Under the Covenant, the person has the following rights: to be informed of the of the nature and cause of the charge against him; to have adequate time to prepare a defense; to be tried without undue delay; to be tried in his own presence with legal assistance of his choice or to have legal assistance assigned, without cost if necessary; to examine witnesses against him and obtain witnesses on his behalf; and to have free assistance of an interpreter.<sup>276</sup> Some of these provisions extend to the investigation stage the protections already afforded persons charged with a crime.<sup>277</sup>

Like the Covenant, the Rome Statute affirms the presumption of innocence of the accused, specifying (although this should be implied) that the Prosecutor has the burden of proving the guilt of the accused.<sup>278</sup> The accused can be convicted only if the Court is convinced of her guilt "beyond reasonable doubt."<sup>279</sup>

Article 67 of the Rome Statute repeats the 1966 Covenant's so-called "minimum guarantees" for the accused at the trial stage.<sup>280</sup> Article 67(1) (a) through (g) reproduces, almost literally, the corresponding provisions of the 1966 Covenant listed above: the right of the accused to be informed promptly and in detail of the charges, the right to have adequate time and facilities to prepare the defense, the right to be tried without delay, the right to be present at the trial and to have legal assistance, the right to examine the witnesses against him and to obtain the examination of witnesses on his behalf, the right to have the assistance of an

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<sup>273</sup> Covenant, *supra* note 273, art. 14(3)(g), 6 I.L.M. at 373.

<sup>274</sup> *Id.* art. 7, 6 I.L.M. at 370.

<sup>275</sup> *Id.* art. 9(1), 6 I.L.M. at 371.

<sup>276</sup> Covenant, *supra* note 273, art. 14(3), 6 I.L.M. at 372-73.

<sup>277</sup> *Id.* art. 14(3)(a), (d), 6 I.L.M. at 372-73

<sup>278</sup> ROME STATUTE, *supra* note 2, art. 66(1-2), 37 I.L.M. at 1040; Covenant, *supra* note 273, art. 14, para. 2.

<sup>279</sup> ROME STATUTE, *supra* note 2, art. 66(3), 37 I.L.M. at 1040.

<sup>280</sup> *Id.* art. 67, 37 I.L.M. at 1040-1041; Covenant, *supra* note 273, art. 14(3), 6 I.L.M. at 372-73.



interpreter, and the right not to be compelled to testify or to confess guilt.<sup>281</sup> Additionally, the accused has “[t]he right to make an unsworn oral or written statement in his/her defense”<sup>282</sup> and the right not to have imposed any reversal of the burden of proof.<sup>283</sup>

According to a typical rule of common law systems, the Statute provides for the Prosecutor to disclose evidence in her possession to the defense as soon as is practicable.<sup>284</sup> However, the Prosecutor must only disclose evidence that shows or tends to show the innocence of the accused, mitigates the guilt of the accused, or affects the credibility of prosecution evidence.<sup>285</sup> These particular acknowledgements represent new developments, although they have been implied in previous provisions.

The victim is allowed only marginal participation in the proceedings. Article 75 of the Rome Statute provides that the Court shall have the power to rule on reparations to the victims, including restitution, compensation, and rehabilitation.<sup>286</sup> The Rome Statute does not, however, provide for a *parte civile* giving victims the power to sue the defendant for damages as a party to the criminal process, as is done in the French and Italian systems among others. The participation of the victim is viewed with disfavor because it would make the task of determining guilt and innocence even more difficult and might prejudice the rights of the accused. In fact, the Rome Statute provides that “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented . . . at stages of the proceedings determined to be appropriate and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>287</sup> In other words, victims do not have the right to become a genuine party to the proceedings, but they do have the right to be represented before the ICC.

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<sup>281</sup> ROME STATUTE, *supra* note 2, art. 67(1)(a-g), 37 I.L.M. at 1040.

<sup>282</sup> *Id.* art. 67(1)(h), 37 I.L.M. at 1040.

<sup>283</sup> *Id.* art. 67(1)(i), 37 I.L.M. at 1040.

<sup>284</sup> *Id.* art. 67(2), 37 I.L.M. at 1040-41.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* art. 75(1), 37 I.L.M. at 1045.

<sup>287</sup> ROME STATUTE, *supra* note 2, art. 68(3), 37 I.L.M. at 1041.

### *I. The Plea of Guilty*

Finally, it is interesting to examine the ICC's handling of the guilty plea. A plea of guilty permits the accused to end the trial by making an admission of guilt.<sup>288</sup> The wisdom of introducing this option into proceedings before the ICC has been much disputed. The guilty plea has been frequently criticized from an ethical as well as juridical point of view, even in those countries where it is permitted. It is usually justified on the practical grounds that it is necessary to efficiently dispense with the courts' caseload. It is commonly thought that a guilty plea, especially one accompanied by a bargain with the prosecutor on the charges or the penalty, would be inconsistent with the function of the ICC. The ICC is designed to administer justice in a public and exemplary manner. Additionally, it has the ability to select the cases it hears on the basis of their seriousness and relevancy.

In the end, it was determined that the accused could not be denied the ability to make an admission of guilt. The Rome Statute, however, provides that the guilty plea must be approved by the Court to result in an immediate conclusion of the proceedings.<sup>289</sup> First, the accused shall be afforded the opportunity to make an admission of guilt or to plead not guilty.<sup>290</sup> Where the accused makes an admission of guilt, the Trial Chamber shall assess the awareness and the voluntariness of the admission.<sup>291</sup> It may convict the accused of the crime only if "the admission of guilt is supported by the facts of the case."<sup>292</sup> Without this sort of corroboration, the admission of guilt will be treated as not having been made and the trial will continue under the ordinary trial procedures.<sup>293</sup>

Moreover, the Trial Chamber may consider that "a more complete presentation of the facts of the case is required in the

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<sup>288</sup> *Id.* art. 65, 37 I.L.M. at 1039.

<sup>289</sup> *Id.* art. 65(2), 37 I.L.M. at 1039.

<sup>290</sup> *Id.* art. 64(8)(a), 37 I.L.M. at 1038.

<sup>291</sup> *Id.* art. 65(1), 37 I.L.M. at 1039; *see also* Olivia Swaak-Goldman, *International Decisions*, 92 AM. J. INT'L L. 282 (1998); David Turns, *The International Criminal Tribunal for the Former Yugoslavia: The Erdemovic Case*, 47 INT'L & COMP. L.Q. 461 (1998).

<sup>292</sup> ROME STATUTE, *supra* note 2, art. 65(1)(c), 37 I.L.M. at 1039.

<sup>293</sup> *Id.* art. 65(3), 37 I.L.M. at 1039.

interests of justice.”<sup>294</sup> In that case, it may request that the Prosecutor present additional evidence or order that the trial be continued under the ordinary trial procedures.<sup>295</sup> Therefore, even when the accused makes a well-founded admission of guilt for the purpose of avoiding a public trial, the Court may require the accused to stand trial, remitting the case to another Trial Chamber if necessary.

However, when the admission of guilt is accepted, no explicit advantage is recognized to the accused, even though it is likely that the admission will be taken into account in determining the appropriate penalty. In particular, the Court is not bound to any discussion between the Prosecutor and the defense regarding the modification of charges or the penalty to be imposed.<sup>296</sup> These provisions are quite significant because they outline a procedure different from the traditional guilty plea of common law systems based on negotiation with the prosecutor. This procedure also varies from the Italian *patteggiamento*, where the reduction of the penalty is predetermined by law and the judge can reject the request of the parties if he is not satisfied with the agreement. It is, in a sense, an intermediate situation: the accused, without assurance of a milder sentence, chooses to avoid the trial with the admission of guilt. Judicial approval, however, is always necessary. This type of compromise between differing juridical traditions is both a hallmark of and crucial to the establishment of an effective International Criminal Court.

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<sup>294</sup> *Id.* art. 65(4), 37 I.L.M. at 1039.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* art.65(5), 37 I.L.M. at 1039.

